

Draft

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Abstract

Legal historian Charles Donahue mastered the method of reading historical legal texts in full interdisciplinary context. He applied his method most fully to medieval church courts, especially dealing with marriage and family questions, but also to other legal texts of Roman law and civilian jurisprudence, and Anglo-American common law. This preface to a Festschrift in his honor offers an appreciative precis of his work.

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Editorial Preface

Leading English legal historian Sir John Baker once wrote that “the guiding logic of the lawyer is different from that of the historian. What the lawyer wants is authority, and the newer the better; what the historian wants is evidence, and the older the better.”¹ Professor Charles Donahue has distinguished himself both as a lawyer and as a legal historian of the first rank.

Donahue’s record as a lawyer and law professor is impressive enough, particularly his work on property law, which has been a staple of the Harvard Law School curriculum for four decades. He wrote a leading textbook (in three editions) and several long articles on property law, and he offered related courses and seminars on comparative family law, inheritance, family property, and real estate. As anyone who has sat in his classroom knows, here Donahue is very much the lawyer. He presses his students to parse the latest statutes responsibly, to cite or distinguish the latest cases carefully, and to appreciate the policy that is being negotiated and the precedent being set in a given case. “So, what’s really going on here,” would often be his final “legal realist” question to the class about a case or statute, as he forced us to see the legal text in full context.

¹ John Baker, *Collected Papers on English Legal History*, 3 vols. (Cambridge: Cambridge University Press, 2013), 2:761, 763, citing F.W. Maitland, *Why the History of English Law is Not Written* (Cambridge: Cambridge University Press, 1888).

While Donahue the lawyer deserves to be celebrated, this volume celebrates his formidable work as a legal historian over the past half century. Here his contributions have been original, weighty, and enduring. Notable are the 100 plus articles, book chapters, and reviews on legal history themes and topics. Included among them are classic articles: “The Policy of Alexander the Third’s Consent Theory of Marriage”; “Roman Canon Law in the Medieval English Church: Stubbs v. Maitland Re-Examined”; “Malchus’s Ear: Reflections on Classical Canon Law as a Religious Legal System”; “*Ius* in the Subjective Sense in Roman Law”; and “Why the History of Canon Law is Not Written?” Included as well are searching reviews of new volumes by the leading legal historians of the past two generations – among them, John Baker, Bruce Frier, R.H. Helmholz, and Anne Lefebvre-Teillard who have contributed to this volume.

Even more valuable have been Donahue’s volumes on medieval legal records – especially the hard to find and parse case law records of medieval courts. The first major book in this vein was his 1982 Selden Society volume on *Select Cases from the Ecclesiastical Province of Canterbury, c. 1200 – 1301*, a massive work of critical reconstruction of all manner of cases, hitherto available only on frayed rag-paper and almost impossible for anyone but refined specialists to penetrate. Then came the wonderful two-volume guide on *The Records of the Medieval Courts*, anchor texts in the new Dunker & Humblot series that Donahue helped to build on Comparative Studies in Continental and Anglo-American Legal History. Then came critical editions, and sometimes translations, of medieval and early modern texts supported by the Ames Foundation that Donahue directed from 1980 to 2015. Included among these Ames volumes is a very recent title, *Appeals to the Privy Council from the American Colonies*, compiled with another contributor to this volume, Mary Bilder.

Donahue’s most important work is his massive 1000 page Cambridge University Press title on *Law, Marriage, and Society in the Later Middle Ages: Arguments About Marriage in Five Courts* (2007). Here, we see him at the height of his powers as a legal historian, showing full command not only of the medieval *ius commune* on marriage and family questions but also of the immense complexities of the English and Continental court systems and their procedures. Using the medieval church court records of York, Ely, Paris, Cambrai, and Brussels as his data set, this book provides a lavish and detailed analysis of all the hard legal questions surrounding marital formation, maintenance, and dissolution that came to these church courts for resolution. General readers come away from this book with a vivid impression of a living family law system in action, every bit as sophisticated as any civil law or common law system of marital family law that came after. Legal historians and family historians must return to this book time and again to check out how their particular topics were worked out by medieval jurists and judges not only in theory but also in action. This book will doubtless be read, mined, and admired for the next century and more.

Donahue the legal historian did not confine himself to his archives and writing desk. He taught wonderful courses and seminars at Michigan, Harvard, as well as

several other schools that he visited on Roman law, Continental Legal History, English Legal History, the History of Marriage Law, the History of Canon Law, and the History of the *Ius Commune* in medieval and early modern times. He advised and supervised hundreds of doctoral and professional school students working on legal history themes and has been a generous correspondent with many scholars and a critical reader of many manuscripts for university presses. He involved himself deeply in building and leading the international guild of legal historians, gathered in such societies as the American Society for Legal History, the American Historical Association, the Selden Society, the Medieval Academy of America, the British Legal History Conference, and the *Iuris Canonici Medii Aevi Consortio*, among others. He has graced distinguished lecterns throughout North America and Europe, and is legendary as a spirited conversationalist and formidable interrogator at professional society roundtables and scholarly panels on legal history.

The theme of “text and context,” which typifies Donahue’s work as a lawyer, is also on full display in his work as a legal historian – thus inspiring the title to this collection. He writes:

I try to take a small body of text, drain out of it as much meaning as possible, and then relate it to the context in which it was written and/or in which it was used. Obviously, you can do this with works that are “literary.” That’s where the method comes from. But it can also be used with the most routine of documents, like court records. Many medievalists are comfortable with this method, but [it] can also help people who are working with other worlds if they want to see comparisons or possible influences. The substantive subjects that I have worked with are principally family law, commercial law, property, and procedure. I try to keep the context as broad as possible: social, economic, political, religious, and strictly legal doctrinal contexts are all fair game.

As his autobiographical chapter herein elaborates, Donahue’s legal history writing reveals a deep appreciation for both “nomos and narrative,”² both canon and interpretation, both the Ur texts of earlier days and the traditions of interpretation and application they inspired. Whether he is teaching the Twelve Tables or the *lex Aquilia*, analyzing a decretal of Alexander III or a case from the Yearbooks, rummaging through the matrimonial case laws of medieval York or the marital jurisprudence of an early modern jurist, his method of legal history is constant and consistent. He first has his readers and students go back to the sources. Only after authenticating the original texts and discerning the range of possible original meanings from their original contexts, he insists, can one responsibly assess the layers of interpretation that time and tradition

² Robert M. Cover, *Narrative, Violence, and the Law: The Essays of Robert Cover*, ed., Martha Minow et al. (Ann Arbor, MI: University of Michigan Press, 1992), 95-172.

have attached to that text or one's imagination or inspiration might impute to it, especially as a judge or an advocate. In this method, Donahue is very much like the great seventeenth-century English legal historian, John Selden, whom John Baker was describing in his memorable line: "What the lawyer wants is authority, and the newer the better; what the historian wants is evidence, and the older the better." That was Selden in a nutshell, and it's Donahue in a nutshell, too.

As former students of Professor Donahue and happy beneficiaries of his instruction as a lawyer and legal historian, we are delighted to present this Festschrift to him with admiration, appreciation, and affection. We present 26 contributions from leading historians in North America and Europe, and only wish we had space to accommodate contributions from the dozens of other historians who would have liked to contribute. We express our deep appreciation to all the contributors for their splendid chapters and timely delivery.

We express our warm thanks to Dean Martha Minow of Harvard Law School for welcoming and supporting the preparation of this volume, and gracing it with her lovely Foreword alongside the equally lovely Foreword of Judge Morris Arnold. We give special thanks to Max Withers at the Robbins Collection for his masterful work in editing this volume, during an especially difficult year for him, as well as to Laurent Mayali, the Director of the Robbins Collection, for publishing this text. And we give special thanks to Amy Wheeler in the Center for the Study of Law and Religion at Emory University for masterminding the administration of this volume from start to finish.

But we owe our greatest thanks to Professor Donahue for his brilliant scholarship, teaching, and mentorship, for his generous humanity, fidelity, and integrity, and for the sterling example he offers to all of us of a gentleman's scholarly life lived well. May it long continue!

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